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No. 80-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP., 615 EAST 168TH ST., CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST., INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM FILED BY THE CITY APPELLEES

INTRODUCTION

The Motion to Dismiss or Affirm of the New York State appellee was filed on November 25, 1980. On December 8, 1980, the appellants filed a Brief Opposing the State appellee's Motion. At that time, no Motion had been filed on behalf of the several New York City appellees. Because of an extension of time, the Motion to Dismiss or Affirm of the City appellees ("City Motion") was not filed until December 26, 1980.

The City Motion raises little that is new. In order that it may not go by default, however, this Brief is filed in opposition to the City Motion. All of the arguments included in the Brief opposing the State's Motion to Dismiss or Affirm are applicable here, and this Brief will be limited to answering other material in the City Motion.[1]

I

With respect to *Kaplan* v. *Prince,* 444 U.S. 938, the City appellees rely on U.S. Law Week for a statement of the issues before this Court. City Motion 11. But, as pointed out in our Jurisdictional Statement (p. 12, n. 21), the *Kaplan* case focused on contract claims. There was in that case a lease which allowed the owner to eliminate services under certain circumstances. This was prevented by the rent laws. The contention made in the case was that the New York statute violated the impairment of the obligation of contracts clause of the Constitution (Art. I, Section 10), and that this impairment of the contract was a taking without just compensation. No such arguments are before the Court in this case.

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[1] The City appellees are correct in saying that "Only the appellants appealed to the Court of Appeals (R. 259)." City Motion 9. This merely highlights the strange procedural situation which is found in this case. The Court of Appeals, despite the fact that the appellees here did not appeal, granted them relief. It held, augmenting the decision of the Appellate Division, "that defendants are entitled to a declaration of constitutionality" (J.S. App. 1a); and it modified the order of the Appellate Division in favor of the appellees despite the fact that they had not appealed. (J.S. App. 2a.)

II

The City appellees list a number of other cases in which the constitutionality of rent controls have been upheld. They then claim that "[l]egislation does not become unconstitutional solely because it exists for more than a few years." (City Motion 12.) In this way, they have conveniently ignored the holding in the first case which they cite, *Block* v. *Hirsh,* 256 U.S. 135. Speaking for the Court there, Mr. Justice Holmes said (256 U.S. at 157):

> The [rent control] regulation is put and justified only as a temporary measure. See *Wilson* v. *New,* 243 U.S. 322, 345, 346. *Fort Smith & Western R. R. Co.* v. *Mills,* 253 U.S. 206. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.

In light of the repeated renewal of rent regulations during the past thirty-seven years, the City cannot seriously contend that the current laws are a "temporary measure."

III

It is true that there have been so-called legislative "findings" at various times in the past thirty-seven years. But these have come to be routine and *pro forma,* a means by which the legislative bodies give themselves power through a verbal tug at their own bootstraps. Over the years the situation has in fact changed greatly, yet the legislative bodies repeat the same "findings."

As the affidavits in this case show—and they are the only opportunity the appellants have had to make "proof" in this case—the fact is overwhelmingly clear that rent control in New York City has been disastrous for the purpose of achieving an increased supply of housing. It has resulted in the abandonment of hundreds of thousands of housing units, and, even more clearly, it has brought about such an impossible economic situation that hundreds of thousands of units have been taken over by the City on foreclosure for default in paying real estate taxes. This has produced a loss of billions of dollars in real estate taxes. (See J.S. 9; R. 72, 83.) Because of the rent

legislation, the City is by far the largest landlord in the City, and it is unable to carry out the necessary rehabilitation. Thus, rent control is its own cause of a low vacancy rate. And in the process, it has caused the extinction of the interest of the owners in hundreds of thousands of housing units. It is a vicious circle which destroys the owners' property interests, and does not provide housing. It cannot properly or constitutionally be justified year after year by a legislative litany which ignores pregnant facts.

The City appellees, at p. 15 of their Motion, recite a number of articles and studies which, they say, provide factual support for their position. This material has never been in evidence in this case, subject to cross-examination or criticism as to its methods, substance, and accuracy.

Moreover, the City appellees' contention that a factual basis for the City Council's recent finding of emergency exists is not supported by the material which they now present. The long-standing condition of the New York City rental housing market does not indicate that the City is faced with "a state of acute emergency." (City Motion 13.) Rather, it shows that the problems in New York are endemic under the current long-continued legislative provisions. As the Supreme Court of Pennsylvania noted in *Warren* v. *City of Philadelphia,* 387 Pa. 362, 127 A.2d 703, 705 (1956), "ordinary conditions or customary existing conditions are not emergencies."

IV

As the City appellees observe (City Motion 8-9), the appellants' attorney stated in the Appellate Division "that he did not believe there were any triable issues of fact and that he believed that the allegations of his complaint were sufficient to grant judgment on the pleadings." This was, of course, on the assumption that the facts alleged and shown by the affidavits would be evaluated.

But the Court of Appeals reached its decision on the ground that the facts on which the appellants rely "do not demonstrate *beyond a reasonable doubt*" that the emergency no

longer exists. (J.S. 2a; emphasis supplied.) This amounts to a holding as a matter of law, in the context of this type of case, that the statute is inevitably constitutional, since, as a practical matter (as the history of the past thirty-seven years shows), no facts can ever be shown which will require an adverse conclusion "beyond a reasonable doubt." This is surely not what this Court had in mind when it said that it "is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends." *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 442.

V

Finally, the City appellees contend, somewhat blandly, that the appellants "should seek their relief in the legislature." (City Motion 16.) But this is a *constitutional* case. Constitutions have been adopted in this country for the purpose, among others, of protecting the people from (1) excessive exercises of legislative power, and from (2) executive failures in administering statutes, which have the same effect. It is the function of the courts to intervene when the actions of legislative bodies or executive authorities are in disregard of limitations imposed by the Constitution.

This is familiar learning, of course, but it is the essence of the American republic. While the Constitution was under consideration in the States, Alexander Hamilton wrote (Federalist, No. 78):

> Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; . . . Without this, all the reservations of particular rights and privileges would amount to nothing.

And as the great Chief Justice said in *Marbury* v. *Madison*, 1 Cranch 137, 177: "It is emphatically the province and the duty of the judicial department to say what the law is."

The City appellees say that the appellants' complaint here is that "The legislatures which have repeatedly reenacted these laws have exercised bad judgment." (City Motion 17.) But that is not the appellants' contention. The questions which the

appellants raise are constitutional issues—whether, under all the circumstances, routinely repeated actions of the legislative bodies in declaring an "emergency," now extending over a period of thirty-seven years, can be justified within the restraints imposed by the Federal Constitution. That is clearly a question for this Court to decide. As a contemporary scholar has said:

> On the whole, there is nothing in our entire governmental structure which has a more leakproof claim to legitimacy than the function of the courts in reviewing state acts for federal unconstitutionality.

Black, Structure and Relationship in Constitutional Law 74 (1969).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,
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